86-915

No. .....

Supreme Court, U.S.
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In The
# Supreme Court of the United States
October Term, 1986

ELSIE M. LEAR,

*Petitioner-Appellee,*

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

*Respondent-Appellant.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

I. WHETHER THE EIGHTH CIRCUIT HOLDING THAT AGENT WAS NOT ACTUALLY AUTHORIZED TO ACCEPT IN HIS OWN NAME ANY BUT THE FIRST OF PLAINTIFF'S CHECKS VIOLATES THE UNITED STATES CONSTITUTION SEVENTH AMENDMENT PROHIBITION AGAINST RE-EXAMINING EVIDENCE BECAUSE IT IGNORES MATERIAL AND SUBSTANTIAL EVIDENCE THAT ALL OF PLAINTIFF'S CHECKS WERE FIRST CONSIDERATIONS FOR SEPARATE SINGLE PREMIUM ANNUITY CONTRACTS ACTUALLY AUTHORIZED TO BE COLLECTED IN AGENT'S OWN NAME.

II. WHETHER, EVEN IF PLAINTIFF'S CHECKS WERE NOT FIRST CONSIDERATIONS, THE EIGHTH CIRCUIT HOLDING THAT AGENT WAS NOT ACTUALLY AUTHORIZED TO ACCEPT IN HIS OWN NAME ANY BUT THE FIRST OF PLAINTIFF'S CHECKS VIOLATES THE UNITED STATES CONSTITUTION SEVENTH AMENDMENT PROHIBITION AGAINST RE-EXAMINING EVIDENCE BECAUSE IT IGNORES THE CONTROLLING SUBSTANTIVE LAW OF MISSOURI REGARDING THE EFFECT OF COURSE OF CONDUCT EVIDENCE IN ESTABLISHING IMPLIED OR ACTUAL AUTHORITY OF AN AGENT AND DISREGARDS THIS EVIDENCE SUPPORTING PLAINTIFF'S ACTUAL AUTHORITY THEORY OF RECOVERY.

III. WHETHER, EVEN IF PLAINTIFF'S CHECKS WERE NOT FIRST CONSIDERATIONS AND WERE NOT ACTUALLY AUTHORIZED TO BE COLLECTED IN AGENT'S OWN NAME, THE EIGHTH CIRCUIT HOLDING THAT PLAINTIFF'S BELIEF IN AGENT'S APPARENT AUTHORITY WAS UNREASONABLE VIOLATES THE UNITED STATES CONSTITUTION SEVENTH AMENDMENT PROHIBITION AGAINST RE-EXAMINING EVIDENCE BECAUSE IT IGNORES

SUBSTANTIVE EVIDENCE SUPPORTING THE REASONABLENESS OF PLAINTIFF'S BELIEF, SUBSTITUTES ITS JUDGMENT FOR THAT OF THE JURY, APPLIES AN IMPROPER STANDARD OF REVIEW AND IGNORES THE CONTROLLING SUBSTANTIVE LAW OF MISSOURI REGARDING THE EFFECT AND SUFFICIENCY OF COURSE OF CONDUCT EVIDENCE IN DETERMINING THE REASONABLENESS OF BELIEF IN APPARENT AUTHORITY.

IV. WHETHER THE EIGHTH CIRCUIT APPELLATE COURT DECISION FAILS TO CONSIDER WHETHER THE DISTRICT COURT'S SANCTION OF REFUSING TO INSTRUCT ON THE AFFIRMATIVE DEFENSE OF THE STATUTE OF LIMITATIONS AS A PENALTY FOR DEFENDANT'S FAILURE TO COMPLY WITH THE DISTRICT COURT'S PRETRIAL ORDER REQUIRING PROPOSED INSTRUCTIONS TO BE SUBMITTED WAS AN ABUSE OF DISCRETION.

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Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported at 798 F2d 1128 (CA8 1986) and is reproduced as Appendix A, App. 1-16. The Order of the Court of Appeals for the Eighth Circuit denying a petition for rehearing is reproduced as Appendix B, App. 17. The Judgment of the District Court based upon the

jury's verdict dated October 17, 1984, is unreported and is reproduced as Appendix C, App. 18. The Order of the District Court, dated March 18, 1985, denying the defendant's Motion for judgment notwithstanding the verdict or a new trial is unreported and is reproduced as Appendix D, App. 19.

## STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on August 8, 1986. A petition for rehearing was denied on September 4, 1986. This Court's jurisdiction is invoked under 28 USC § 1254(1).

## STATEMENT OF CASE

From April of 1965 until April, 1979, Denzil Daniel David (hereinafter called Agent), was a licensed Missouri insurance agent under contract with The Equitable Life Assurance Society of the United States (hereinafter called Defendant), as Defendant's agent enjoying office space, secretarial services, telephone and brochures, pamphlets and literature supplied by and at the expense of Defendant, employed to sell all products of Defendant. Each of the three employment contracts between Defendant and agent prohibit agent from entering under contract with or into the service of any other insurance company or language of similar import; required agent to canvass for applications for annuity contracts and collect the first considerations thereon; permitted agent to collect the same in his own name and run said funds through his personal checking account and he had done so for many years; made agent a trustee over funds collected and was to keep said

funds entirely separate and distinct from other funds; required agent not to pay, allow or offer to pay or allow any rebate of premiums or considerations in any manner whatsoever; required agent to be bonded and to follow the rules and regulations as established by Defendant and required agent to perform such other duties as the agency manager may assign and engage in no activity adversely affecting Defendant's reputation. It was a further duty of agent to obtain the trust and confidence of prospective customers of Defendant, otherwise no insurance could be sold. There were at least two supervisory tiers of authority over agent, namely an agency manager and district manager whose responsibility was to supervise agent.

Agent's contract with Defendant was terminated in April of 1979 and his license to sell insurance was revoked in June of 1979 pursuant to a consent signed by agent agreeing to the same. This termination and revocation was the result of an investigation by the Missouri Division of Insurance and the Defendant revealing that said agent had collected premiums (both first and subsequent) in agent's name individually from numerous persons (the bulk of whom were elderly and/or infirm) which were intended by said individuals to be remitted to the Defendant but which were, instead, run through agent's personal account, a portion remitted to Defendant in the form of checks drawn upon agent's personal account for the customers premiums and the balance converted to agent's own use.

In December of 1972, agent contacted the elderly and infirm Elsie M. Lear (hereinafter called Plaintiff), who had virtually no business experience and less than a high school education and her elderly husband (who was dying

with cancer), regarding insurance with Defendant. Agent discussed with Plaintiff an insurance policy through Defendant on the life of Plaintiff and obtained a check in the amount of $200 for the premium on this policy. A few days thereafter agent discussed with Plaintiff an annuity contract with Defendant and Plaintiff purchased a regular payment annuity through agent with Defendant, evidenced by a check in the amount of $887 payable to agent personally. No application forms were filled out or signed by Plaintiff because agent advised he would handle all of the paperwork for her. This application was subsequently cancelled or withdrawn because, as farmers, Plaintiff's income and cash flow would not allow regular premium payments. Cancellation was accomplished by simply notifying agent orally and his informing the Defendant. Defendant has a record of this transaction showing an annuity application which was withdrawn before issuance.

Within days of the cancellation of the regular premium annunity, agent displayed various literature of Defendant and represented to Plaintiff that she could purchase single premium lump sum retirement immediate payment annuity contracts with Defendant more easily tailored to her cash flow which yielded a higher return on her investment than available at banks. Under this arrangement, Plaintiff would pay to agent as agent for Defendant and for remittance to Defendant certain sums as first, single (and only) premiums or considerations for the purchase of separate lump sum annuity contracts as Plaintiff's cash flow permitted. Plaintiff was then to receive payments from Defendant through agent to Plaintiff beginning approximately one month after each investment. Since both Plaintiff and her husband were exten-

sively hospitalized shortly after the first check under this arrangement was delivered to agent, were not in very good health and were repeatedly hospitalized thereafter, it was agreed that agent would keep in his files Plaintiff's contracts purchased through this plan. Agent left with Plaintiff only the documents he prepared, explaining they showed the amount per month she could count on for her retirement under the annuity contracts with Defendant. Plaintiff entered into the first transaction of this nature on January 10, 1973, about the same time the regular payment annuity was cancelled, represented by Plaintiff's check in the amount of $25,000. The same arrangement was entered into as represented by two checks (totaling $30,000) dated March 17, 1973, a check (in the amount of $25,000) dated September 18, 1973, a check (in the amount of $15,000) dated September 8, 1974, a check (in the amount of $15,000) dated February 20, 1975, a check (in the amount of $5,000) dated June 23, 1975, and two checks (totaling $10,000) dated September 6, 1975. Each of these checks, totaling $125,000.00, were all intended to purchase separate immediate payment annuity contracts. Agent did not invest the money as represented and promised but converted it to his own use.

Plaintiff received the first payment under the first annuity in February 1973, received fairly regular payments through March 30, 1978, and ceased receiving any payments after December, 1978. Payments were never in an amount exceeding that called for under the annuity arrangement. Agent advised that the reason for some payments being late was that he had not yet received the funds from Defendant. Plaintiff actually discovered this fraud in 1980 following the death of her hus-

band and first suspected agent of fraud in December, 1978, when he indicated no more funds would be forthcoming.

Plaintiff obtained a non-dischargable judgment in Bankruptcy Court against agent in the amount of $125,000.00 pursuant to a stipulation that the funds had been obtained from Plaintiff by fraud. The essence of this fraud was agent's misrepresentations that he was going to remit said funds to Defendant to purchase annuities for Plaintiff.

Plaintiff brought suit in a Missouri State Court for fraudulent misrepresentation against the Defendant, based on the statements of its agent, on March 15, 1983. The Defendant removed the action to Federal Eastern District Court for Missouri on the basis of diversity jurisdiction. In disobedience to the District Court's pretrial order, Defendant did not submit a proposed instruction on the affirmative defense of the statute of limitations. Its objection to Plaintiff's verdict director for failure to submit this defense was overruled. Following a jury trial, Plaintiff obtained a verdict and judgment in the amount of $214,000 actual damages and $200,000 punitive damages. (App. 18) Defendant's Motion for judgment notwithstanding the verdict or a new trial was denied. (App. 19)

On August 8, 1986, the United States Court of Appeals for the Eighth Circuit reversed the judgment in favor of Plaintiff entered by the District Court pursuant to the jury's verdict on all but the first check and remanded the case for further proceedings in accordance with its opinion on that single check. (App. 1-16) On September 4, 1986, the Court denied Plaintiff's petition for a rehearing. (App. 17)

For the reasons set forth herein, Plaintiff believes that the Eighth Circuit Court of Appeals violated her Seventh Amendment right to jury trial and to not have facts tried by the jury re-examined by ignoring material facts and inferences consistent with the jury's verdict establishing all Plaintiff's checks were first considerations for separate single premium annuities, disregarding the substantive law of Missouri regarding the effect and sufficiency of course of conduct evidence in establishing actual authority and defining the reasonableness of belief in apparent authority and applying an improper standard of review by examining the totality of the evidence and record as a whole and concentrating on evidence and inferences unfavorable to the verdict and implicitly rejected by the jury. Finally, Plaintiff believes that the Eighth Circuit Court of Appeals failed to consider the propriety of the District Court's imposition of the sanction of refusing to instruct on the affirmative defense of the statute of limitations as a penalty for Defendant's failure to comply with the District Court's pretrial order requiring submission of an instruction on said affirmative defense.

Since the facts and issues were fairly submitted to and tried by the jury and the error of the Eighth Circuit manifest on the face of its Opinion, the same should be reversed, vacated and the cause remanded with directions to reinstate the judgment of the District Court.

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## ARGUMENT

### I. THE EIGHTH CIRCUIT HOLDING THAT AGENT WAS NOT ACTUALLY AUTHORIZED TO ACCEPT IN HIS OWN NAME ANY BUT THE FIRST OF PLAINTIFF'S CHECKS VIOLATES THE UNITED STATES CONSTITUTION SEVENTH AMENDMENT PROHIBITION AGAINST RE-EXAMING EVIDENCE BECAUSE IT IGNORES MATERIAL AND SUBSTANTIAL EVIDENCE THAT ALL OF PLAINTIFF'S CHECKS WERE FIRST CONSIDERATIONS FOR SEPARATE SINGLE PREMIUM ANNUITY CONTRACTS ACTUALLY AUTHORIZED TO BE COLLECTED IN AGENT'S OWN NAME.

The Seventh Amendment to the United States Constitution specifically provides

> In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

This admonition has been interpreted to prohibit re-examination of facts except by way of new trial, *Barreda v. Silsbee,* 62 US 146 (1859), prescribes the limits of judicial power, *U.S. v. Louisiana,* 123 US 32 (1887), and gives rise to the standard of review for jury-tried cases. *Connell v. Sears, Roebuck & Co.,* 722 F2d 1542 (CA Fed. 1983). " . . . it is well known that the only modes known to the common law of re-examining the facts of a case, after they have been found by a jury, are the granting of a new trial . . ." *Barreda v. Silsbee,* Supra at p. 166. Specifically, an Appellate Court in reviewing a jury verdict is to view the evidence in the light most favorable to the jury's verdict, give the prevailing party the benefit of all reasonable inferences from said evidence, resolving all conflicts in the evidence in the favor of the prevailing

party and, then, determine if any evidence of substance supports it. (App. 5) The Eighth Circuit has, in the past, held that "The jury was presented with sufficient, although not substantial, evidence from which it could find . . ." the facts upon which its decision rested. *Northern v. McGraw-Edison Co.*, 542 F2d 1336 at p. 1349 (CA8 1976). While the Eighth Circuit Court of Appeals quotes this standard with approval, (App. 5) it failed to apply the same in determining that there was no actual authority for the collection of any but the first of Plaintiff's checks and granting judgment notwithstanding the verdict accordingly.

There was evidence of substance supporting the jury's verdict in the form of Plaintiff's unrefuted testimony that all checks were first (and only) payments for single premium annuities. This was consistent with the evidence regarding the reason this type annuity was necessary, the large and varying amounts and irregularity of the respective checks, the Defendant's document confirming Plaintiff's recollection of cancellation of a monthly payment annuity, agent's course of conduct of collecting all premium checks in his own name and agent's stipulation that he defrauded Plaintiff by falsely representing that her funds would be forwarded to Defendant to purchase single premium annuities. The Eighth Circuit's failure to consider this evidence is clear from the complete lack of discussion of any of these facts as they relate to the $100,000 worth of checks delivered after January, 1973. (App. 6) Analysis of these checks focusing upon whether the same are first or subsequent checks fails to properly consider that all were first (and only) payments for separate single premium annuities. It is of no consequence that the purchases after the first were through the same agent and with the same com-

pany. Each was still a first consideration expressly authorized by agent's contract to be collected, by practice and custom impliedly authorized to be collected in his own name and, thus, actually authorized. Since reasonableness of Plaintiff's belief in agent's authority to receive her funds on behalf of Defendant in this fashion is not an element of actual authority, it need not be considered. Rather, if Plaintiff's evidence that each check was a separate purchase of a new annuity is believed, (as the jury did) she is entitled to recover under her theory of actual authority since she is not bound by secret limitations on agent's authority. *Wynn v. McMahon Ford*, 414 SW2d 330 (Mo. App. 1967). It is important to recognize that while the fraud continued from one check to the next in terms of preventing detection, each check given was a new fraud completed when agent received Plaintiff's respective checks. The Eighth Circuit's focus on the secret limitation in agent's contract misconstrues what that limitation truly means, ignores substantial evidence favoring the jury's verdict, constitutes a judgment notwithstanding the verdict which the trial court, in its infinitely better position to weigh and evaluate the evidence, saw fit to deny (App. 19) and is the worst of all possible violations of Plaintiff's Seventh Amendment right to not have the evidence re-examined by the Appellate Court and its judgment substituted for that of the jury. Analysis should focus upon the fact that once a defrauded party gives her money to an agent under the circumstances of this case, subsequent transactions are made easier, not more difficult, particularly in light of the fact payments were being received as represented.

**II. EVEN IF PLAINTIFF'S CHECKS WERE NOT FIRST CONSIDERATIONS, THE EIGHTH CIRCUIT HOLDING THAT AGENT WAS NOT ACTUALLY AUTHORIZED TO ACCEPT IN HIS OWN NAME ANY BUT THE FIRST OF PLAINTIFF'S CHECKS VIOLATES THE UNITED STATES CONSTITUTION SEVENTH AMENDMENT PROHIBITION AGAINST RE-EXAMINING EVIDENCE BECAUSE IT IGNORES THE CONTROLLING SUBSTANTIVE LAW OF MISSOURI REGARDING THE EFFECT OF COURSE OF CONDUCT EVIDENCE IN ESTABLISHING IMPLIED OR ACTUAL AUTHORITY OF AN AGENT AND DISREGARDS THIS EVIDENCE SUPPORTING PLAINTIFF'S ACTUAL AUTHORITY THEORY OF RECOVERY.**

In a diversity action, State Law controls as to the substantive law of the case. *Erie R. Co. v. Tompkins,* 304 US 64 (1938). The constellation of facts which give rise to a cause of action has repeatedly been held to be a matter of substantive law controlled by State precedent. *Wolgin v. Simon,* 722 F2d 389 at page 391 (CA8 1983).

In the diversity case at bar, the Eighth Circuit Court of Appeals failed to recognize and follow the substantive law of Missouri that actual authority of an agent may be predicated upon a course of conduct engaged in by the agent and acquiesced in by the principal. *Jefferson-Gravois Bank v. Cunningham,* 674 SW2d 561 (Mo. App. 1984). This principle is recognized in paragraph 2 of the actual authority definition given by the District Court. (Appendix E, App. 20) Consequently, even if the strained construction of the facts indulged by the Eighth Circuit's conclusion that these were not all first premiums is permitted to stand, Plaintiff is still entitled to recover under her theory of actual authority since the course of conduct

evidence established the same. The complete lack of any discussion of the effect of course of conduct evidence establishing this agent's collection of subsequent premiums in the form of checks payable to said agent individually on the actual authority of this agent to collect said checks in the fashion above indicated, clearly indicates the Eighth Circuit's failure to address Missouri's substantive law on this issue. This fact is best illustrated by the Eighth Circuit's bold conclusion that "there is no such express authority." (App. 6) followed by a discussion of the effect of course of conduct on the apparent authority of this agent. The fact that the Appellate Court reached that conclusion without examining the effect of course of conduct evidence as it relates to estalishment of this agent's actual authority yields the inescapable conclusion that either the evidence was overlooked or its effect misunderstood. In any event, the Eighth Circuit certainly was not viewing the evidence in the light most favorable to Plaintiff, not giving Plaintiff the benefit of all reasonable inferences nor resolving conflicts in the evidence in favor of Plaintiff when it ruled that the limitation in agent's contract set the limits of his actual authority without discussing the effect of agent's course of conduct contrary to that very limitation. Both State and Federal Courts have uniformly established that secret limitations on an agent's authority are not binding on third parties unaware of the limitations. *Tietjens v. Gen. Motors Corp.*, 418 SW2d 75 (Mo. Sup. 1967); *Wynn v. McMahon Ford,* Supra; *Northern v. McGraw-Edison Co.*, Supra. Consequently, the limitation in this agent's contract to the collection of only first premiums or considerations is not binding upon Plaintiff since she was unaware of said limitation, *Wynn v. McMahon Ford,* Supra, the limitation is contrary to an established course of con-

duct, is a deviation from the normal and customary practice in the insurance industry and is contrary to the positive representations made by said agent inducing Plaintiff not to make inquiry. *Bowers v. SHS Motor Sales,* 481 SW2d 584 (Mo. App. 1974).

The evidence established that agent's practice of collecting premium checks in his own name was permitted by Defendant's contract with agent as to first premiums or considerations and that agent had a long-standing custom of collecting all premium checks, not just the first, in his own name despite express provisions in his employment contract to the contrary. Defendant permitted this to continue for a period of years, before, during and after the fraud perpetrated upon Plaintiff. Furthermore, it is a common practice in the industry for premium checks to be made payable to the agent and not the company. This fact has even been recognized by the Missouri Supreme Court in *Glynn v. M.F.A. Mutual Ins. Co.,* 254 SW2d 623 (Mo. Supp. En Banc 1953) where the Court said "It was his duty to make collections . . .". Thus, the actual authority of agent as expressed in the contract, as implied by prior dealings between agent and Defendant and agent and Plaintiff and as implied by custom in the industry generally, clearly indicates that the receipt by agent in his own name of *all* of the checks which are the subject of this suit was an act within his actual authority whether express or implied. Certainly the jury had ample evidence before it to find that the receipt of Plaintiff's funds by agent was within his actual authority. The Eighth Circuit's holding that there was no actual authority to collect, in agent's own name, any but the first of Plaintiff's checks places undue emphasis on the secret limitation in agent's

contract, ignores substantial evidence supporting Plaintiff's recovery, is in direct conflict with the controlling substantive law of Missouri regarding the creation of actual authority by course of conduct, constitutes a judgment notwithstanding the verdict denied by the trial court (App. 19) and is exactly the re-examination of facts tried by the jury prohibited by the Seventh Amendment. U.S. Const. Amend. VII; *Baughman v. Cooper-Jarrett, Inc.*, 530 F2d 529 (CA3 1976), *cert. den.*, 428 U.S. 825 (1976); *U.S. v. Lesher*, 59 F2d 53 (CA9 1932)

**III. EVEN IF PLAINTIFF'S CHECKS WERE NOT FIRST CONSIDERATIONS AND WERE NOT ACTUALLY AUTHORIZED TO BE COLLECTED IN AGENT'S OWN NAME, THE EIGHTH CIRCUIT HOLDING THAT PLAINTIFF'S BELIEF IN AGENT'S APPARENT AUTHORITY WAS UNREASONABLE VIOLATES THE UNITED STATES CONSTITUTION SEVENTH AMENDMENT PROHIBITION AGAINST RE-EXAMINING EVIDENCE BECAUSE IT IGNORES SUBSTANTIVE EVIDENCE SUPPORTING THE REASONABLENESS OF PLAINTIFF'S BELIEF, SUBSTITUES ITS JUDGMENT FOR THAT OF THE JURY, APPLIES AN IMPROPER STANDARD OF REVIEW IN REACHING THAT CONCLUSION AND IGNORES THE CONTROLLING SUBSTANTIVE LAW OF MISSOURI REGARDING THE EFFECT AND SUFFICIENCY OF COURSE OF CONDUCT EVIDENCE IN DETERMINING THE REASONABLENESS OF BELIEF IN APPARENT AUTHORITY.**

Analysis of the reasonableness of Plaintiff's belief that agent had the apparent authority to receive her checks in his own name and remit the same to Defendant for the purchase of separate single premium annuities must focus upon the appearance to do just that. Moreover, by virtue of the fiduciary relation, Plaintiff's reliance on appear-

ances to create the apparent authority of agent to remit her funds from each of her checks for the purchase of single premium annuities is to be viewed not only in a light most favorable to the jury's verdict and giving Plaintiff the benefit of all reasonable inferences, but, also, without any need or necessity on her part to inquire behind the appearances creating such authority. *Tietjens v. General Motors Corp.*, Supra; *Bowers v. S.H.S. Motor Sales*, Supra; *Shechter v. Brewer*, 344 SW2d 784 (Mo. App. 1961) The only authority which Plaintiff need reasonably have believed (based upon appearances) agent had, is the same authority which the contract expressly conferred, prior dealings between said agent and Defendant impliedly authorized, prior dealings between agent and Plaintiff apparently authorized and custom and practice in the industry readily recognizes.

The facts which support the reasonableness of Lear's reliance on the appearance of authority in agent to receive her funds and remit the same to Defendant for the purchase of a single premium annuity are many and various. Specifically, the fact agent was provided with a business card, pamphlets and brochures, office space, secretarial services, a telephone listing and other indicia of his employment by Defendant; the employment contract between Defendant and agent specifically authorizing the receipt by him of funds for remittance to Defendant; the course of conduct between Defendant and agent establishing that Defendant had authorized him to collect funds in his own name and remit them through his personal checking account to the Defendant with respect to not only the first premiums but also subsequent premiums; the fact that one of agent's duties was to develop a fiduciary rela-

tionship with his clients and the effect of that relationship, both practically and legally, on Plaintiff's duty to inquire into the true facts; the well established custom in the insurance industry for agents to collect premiums in their own name for remittance to their principal; the fact the first attempt by Plaintiff to purchase an annuity with Defendant was accomplished by signing a check payable to agent but intended for remittance to Defendant; and the powers normally associated with the position agent held all indicate his apparent authority. *Shechter v. Brewer,* Supra; *Titjens v. General Motors Corp.,* Supra

The Eighth Circuit's concentration on the terms of the "personal notes" clearly demonstrates that all evidence was not being viewed in favor of Plaintiff nor were conflicts in the evidence being resolved in her favor. The very language of the Opinion clearly demonstrates that the Eighth Circuit was substituting its judgment for that of the jury in contravention of the Seventh Amendment's prohibition against re-examining evidence rather than viewing the evidence as it favors Plaintiff and resolving conflicts in the evidence in a manner consistent with the verdict. U.S. Const. Amend. VII Specifically, at page 7 of the Opinion the Eighth Circuit indicated that it was viewing ". . . the totality of the evidence, especially the personal notes, . . ." in holding ". . . that an ordinarily reasonable and prudent person could not reasonably have believed that David had the apparent authority to collect the later premium checks." (App. 8) This analysis is faulty and exceedingly confusing particularly in light of other holdings in the case. Specifically, the Eighth Circuit held that no violation of the parol evidence rule existed by virtue of Plaintiff's testimony in variance with and in ex-

planation of the terms of the "personal notes". (App. 15) Rather, the jury was entitled to consider oral evidence in variance with the terms of the "notes" in support of the plea of fraud to explain the transaction, " . . . notwithstanding its effect may be to contradict what is in writing." *Barreda v. Silsbee*, Supra at p. 170, did consider the same and found Plaintiff's evidence persuasive. The substance of Plaintiff's testimony was that these were not personal notes at all but were, rather, receipts for her funds and an indication of the amount Plaintiff could expect from each investment. If the jury was entitled to hear this evidence then certainly it was entitled to believe it. "That principle is too well established and too generally acknowledged to require any confirmation." *Id.* Analysis focusing on the effect of the notes and agent's payments is inappropriate because the jury impliedly passed on whether these were "notes" and found they weren't solely agent's responsibility as would be true with notes despite Defendant's best efforts to so persuade the jury. Consequently, the designation of these documents as "personal notes" is contrary to the implicit findings by the jury. " . . . it must be assumed, in the further examination of this question, that the facts are as they have been found to be by the jury." *Id.* at p. 167. Against this substantial evidence and inferences favoring Plaintiff the Eighth Circuit weighs the "notes" and determines that Plaintiff's belief in agent's apparent authority is unreasonable as a matter of law. (App. 7) Curiously, the Court also held that the "personal notes" are "evidence which would point to David's contemporaneous intent to defraud". (App. 14) Any argument regarding notice to Plaintiff by the "notes" or checks drawn on agent's personal account is simply not in point since these acts

constitute part of the effort to prevent detection of the fraud, do not bear at all on whether agent was apparently authorized to receive Plaintiff's funds for remittance to Defendant, and was determined by the jury in favor of Plaintiff in passing upon the reasonableness of her reliance on the appearance of authority. Thus, the Eighth Circuit Opinion in this case is not only troublesome and confusing but a direct violation of Plaintiff's Seventh Amendment right prohibiting re-examination of facts tried by the jury since it constitutes a judgment notwithstanding the verdict on Plaintiff's apparent authority theory of recovery. U.S. Const. Amend. VII; *U.S. v. Lesher,* Supra.

The Eighth Circuit's statement that the agent's declarations cannot create his apparent authority is, though correct, inapposite. (App. 7, note 8) While said declarations may not create apparent authority, they are helpful in explaining the reasonableness of Plaintiff's belief in apparent authority. The first annuity which was withdrawn or cancelled was applied for without the Plaintiff signing any application and establishes a course of conduct from prior dealings upon which Plaintiff reasonably may rely in believing that agent had the authority to fill out documents on her behalf in applying for annuities. Since Defendant's own exhibits and records show that this application was received by Defendant, it cannot be questioned that application could be made in this fashion. Therefore, agent was apparently authorized to represent to clients that he could fill out their applications for annuities for them. To hold to the contrary disregards well-established precedent in the State of Missouri regarding what a jury may believe with respect to the reasonableness of a Plaintiff's reliance on

apparent authority. Specifically, *Bowers v. S.H.S. Motor Sales,* Supra, held that even though the contract between the agent and plaintiff indicated that the car being purchased was used, plaintiff was entitled to rely upon the agent's representation that the vehicle was new. Further, *Wynn v. McMahon Ford,* Supra, held that a "car order form" was not, as the document stated, an offer to purchase by plaintiff but was, rather, a receipt for down payment and that the apparent authority of agent arose from the powers and duties normally associated with the position agent held. *Baker v. St. Paul Fire and Marine Ins. Co.,* 427 SW2d 281 (Mo. App. 1968), held that a plaintiff may rely upon the appearance of authority and all representations of the agent within the scope of said apparent authority even though in direct contradiction of express limitations on agent's authority. *Tietjens v. GMC,* Supra, held that an application form which specifically and prominently displayed the limits of the agent's authority was not controlling. Rather, the plaintiff was entitled to rely upon the appearance of authority created by course of conduct and powers normally associated with the position agent held and the jury entitled to believe that said reliance was reasonable particularly where the fraudfeasor has superior knowledge of the facts. Finally, *Bowers v. S.H.S. Motor Sales,* Supra, held that reasonableness is not even an issue where, as here, the fraudfeasor makes a positive representation inducing Plaintiff not to make inquiry into the true facts.

Another item of evidence not adequately developed in the Eighth Circuit Opinion is the effect of the uncontradicted evidence at trial that insurance agents, as a part of their duties, are to invite and obtain the trust and confidence of prospective clients and are, by their very

nature fiduciaries with respect to their clients and the receipt and remittance of said clients' funds. Analysis of the reasonableness of Plaintiff's belief that this agent was apparently authorized to collect her checks in his own name and remit her funds to Defendant for the purchase of lump sum single consideration annuity contracts should be viewed in light of the evidence of the fiduciary nature of the relationship existent between this Plaintiff and Defendant's agent as a part of said agent's duties under his employment contract.

Further compounding the difficulty in the Appellate Court's decision is the irreconcilable conclusions that while Plaintiff's reliance on this agent's misrepresentation that he would remit her funds to Defendant was reasonable her belief that he had the authority to engage in the exact same conduct was unreasonable as a matter of law. If Plaintiff was reasonable in relying upon this agent's representation, then certainly she was reasonable in believing he had the authority to make that same representation.

Finally, and most troublesome of all, is the Eighth Circuit's conclusion that by virtue of a secret limitation directly contrary to normal insurance industry practice and this agent's course of conduct with Plaintiff, agent was not apparently authorized to do what he was actually authorized to do . . . namely, collect premiums in his own name which were intended for Defendant.

The precedent established by the Appellate Court decision is exceedingly dangerous to society since Plaintiff's offer of proof amply demonstrated that twenty-three (23) other elderly individuals were defrauded by agent in essentially the same fashion. The evidence at trial from

Defendant's employee proved that this agent had collected premiums, both first and subsequent, for years. It cannot be questioned that the bulk of society consider themselves reasonable in giving their agents premium checks made payable to the agent with the trust that the same will be forwarded to the insurance carrier. The jury's verdict indicates that it also felt such a practice was established satisfactorily and Plaintiff's reliance on such a practice was reasonable. What was said in *Darks v. Grocer Co.*, 146 Mo. App. 246 (1910), is equally applicable here. Specifically, the Court stated that the liability of the principal for his agent's tort is not based upon a presumed authority in the agent to do the acts but upon public policy for the reason that it is more reasonable when one of two innocent persons must suffer from the wrongful act of a third person that the principal who has placed the agent in the position of trust and confidence should suffer than a stranger. While this principle has been variously stated to involve imputing knowledge by the agent of his own fraud to the principal *as in Globe Indemnity Co. v. National Bank, St. Louis,* 133 SW2d 1066 (Mo. App. 1939), the controlling principal underlying all of these cases is that stated in *Southern Pac. Trans. Co. v. Continental Shippers,* 485 F. Sup. 1313 (D.C. Mo. 1980), that as between a principal and a third party, the principal must bear the risk when his agent fails to properly perform his duties. In the instant case, Defendant cannot even claim innocence since it permitted the very practice of agent collecting all premium checks payable to him which gave rise to the opportunity to commit this fraud. To allow a secret limitation in agent's contract to be binding upon the public is contrary to society's expectations and the interests of justice. To allow the Eighth Circuit to perpetrate that injustice by substituting its judgment for that of the jury

regarding what society may reasonably believe is a violation of Plaintiff's Seventh Amendment rights. U.S. Const. Amend. VII

**IV. THE EIGHTH CIRCUIT APPELLATE COURT DECISION FAILS TO CONSIDER WHETHER THE DISTRICT COURT'S SANCTION OF REFUSING TO INSTRUCT ON THE AFFIRMATIVE DEFENSE OF THE STATUTE OF LIMITATIONS AS A PENALTY FOR DEFENDANT'S FAILURE TO COMPLY WITH THE DISTRICT COURT'S PRETRIAL ORDER REQUIRING PROPOSED INSTRUCTIONS TO BE SUBMITTED WAS AN ABUSE OF DISCRETION.**

The Eighth Circuit Opinion on the issue of the statute of limitations is totally silent regarding the failure of the Defendant to submit an instruction on the affirmative defense of the statute of limitation in compliance with the District Court's pretrial Order and the sanction imposed by the District Court of omitting said issue from the consideration of the jury as a penalty for that noncompliance. The proper standard of review for this sanction is abuse of discretion. However, the Eighth Circuit Opinion discusses the different standard to be employed for omitted jury instructions objected to at trial in determining there was material evidence to support this defense and prejudice to Defendant in omitting it. (App. 10) In the instant case, the Defendant objected to the Plaintiff's verdict director on the grounds that the same did not contain a required finding that Plaintiff had satisfied the statute of limitations. This objection was overruled by the District Court without further comment. The most obvious ground for the District Court's overruling of said objection and refusal to submit an instruction on this affirmative defense to the jury is the imposition of sanctions for noncom-

pliance with pretrial orders contemplated by Local Rule 13. (Rule 13, Form A, D.C.E.D. Mo.) While the Eighth Circuit Opinion discusses the failure of the Defendant to request a specific written instruction and failure to raise the lack of said instruction in its motion for new trial, (App. 9) the Opinion does not discuss whether the District Court abused its discretion in imposing sanctions on the Defendant for failure to comply with the pretrial order requiring the submission of a proposed instruction on this issue. Even a cursory reading of Rule 13 reveals that the sanction imposed by the District Court was an appropriate one since the intent and purpose of pretrial orders is to aid the Court and counsel in the framing of issues for trial. Any reasonable ground in support of the Court's ruling is to be indulged when evaluating the same for abuse of discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 US 639 (1976) Since the Defendant did not comply with the Court's pretrial order by submitting an instruction on the affirmative defense of the statute of limitations, did not mention the statute of limitations in its opening statement, did not apprise the Court during trial of its intention to rely on said defense but only objected to the Plaintiff's verdict director for failure to submit said issue, the trial Court was certainly within its discretion in imposing the sanction of eliminating this issue from the jury's consideration.

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## CONCLUSION

For the foregoing reasons, Petitioner, Elsie M. Lear, respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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*Elsie M. Lear*

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1453

| | | |
|---|---|---|
| Elsie M. Lear, Appellee, | • | |
| v. | • | Appeal for the United States District Court |
| The Equitable Life Assurance Society of the United States, Appellant. | • | for the Eastern District of Missouri. |

Submitted: November 11, 1985

Filed: August 8, 1986

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

Elsie M. Lear brought suit in a Missouri state court for fraudulent misrepresentation against The Equitable Life Assurance Society of the United States (Equitable), based on the statements of its agent, Denzil D. David. Following removal to federal district court[1] on the basis of diversity jurisdiction, a jury awarded Lear $214,000.00 actual damages and $200,000.00 punitive damages. Equitable appeals arguing that (1) Lear failed to establish David's agency and authority; (2) appellee did not prove the statute of limitations was satisfied and it was error not to instruct the jury on the statute; (3) a prior bankruptcy judgment against David was res judicata as to this case; (4) it was error to give a non-Missouri Approved Instruction on apparent authority; (5) the verdict director

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[1]The Honorable Stephen N. Limbaugh, United States District Judge, Eastern and Western Disticts of Missouri.

was incomplete; (6) deposition evidence was improperly admitted; (7) the parol evidence rule was violated; and (8) Lear failed to prove her damages.

We reverse in part and remand for a redetermination of damages and the application of the statute of limitations.

## BACKGROUND

From January, 1973 to approximately September, 1975 Lear and her husband (now deceased) delivered checks totaling $125,000.00 to David which he was to invest in Equitable for a retirement annuity for the Lears. In exchange for their checks, which were made payable to David, the Lears were given documents entitled "Personal Notes."[2] These notes, which were on one page each and either typewritten or in some cases handwritten, made no mention of Equitable, but rather stated that David would pay the Lears a certain amount of money the first of every month.[3] Lear testified that she believed David

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[2]The Lears did make some purely personal loans to David, but they appear to have been made after the monies supposedly were paid to David for the annuities.

[3]The first note signed by the Lears and David serves as an accurate example of all the notes signed by them. We reprint a copy of it here.

January 9, 1973 — James E. Lear
Elsie M. Lear
Personal Note. — Denzil D. David
$25,000.00 Note.

I, the undersigned, do promise to pay to Mrs. Lear, Elsie, Wife of James E. Lear, the Monthly Payments of $225.50 for a 10 year period on the first day of each Month beginning Feb. 10, 1973 or untill [sic] the note is repaid in full.

(Continued on following page)

would deposit the money, purchase an annuity for the couple and then upon receiving money from Equitable would mail the check to them. The couple did receive some payment checks from David, written on his personal account which listed both him and his wife as account holders. Unfortunately, he never remitted any money to Equitable.

The Lears' only prior dealing with David was in December, 1972 when they purchased an insurance policy on Mrs. Lear's life and an annuity from Equitable, both of which they cancelled. Lear testified that they cancelled these because as farmers they could not be assured of a regular income to make premium payments. As an alternative, David devised a single premium annuity which they could purchase when they had large sums of cash. This is what they believed they had purchased from Equitable.

The Lears never received any documents from Equitable or had any dealings with anyone other than David. The only thing they received with Equitable's name on it was David's business card. They never signed any appli-

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(Continued from previous page)

If Mrs. Elsie Lear predeceases the Bearer of the note, Mr. James E. Lear, then the payments will continue to Mr. James E. Lear on a Monthly basis untill [sic] the note is repaid.

No Part of this Note can be altered in any way unless all of the Parties Agree.

This Note signed and agreed to on this 9th day of January 1973 by the following Parties by the signatures afixxed [sic].

/s/ James E. Lear
/s/ Elsie M. Lear
/s/ Denzil D. David

cations or forms with Equitable, because David said he would do this for them. Lear did call the Hannibal, Missouri office to confirm that David worked there.

David used Equitable's office space, telephones, literature and secretarial services. His employment contract (1) prohibited him from working for another insurance company; (2) required him to sell annuities; (3) allowed him to collect the first premium check in his own name; and (4) stated that he was to follow Equitable's rules and regulations. He was supervised by an agency manager and a district manager.

Prior to this case, Lear filed suit against David in Missouri state court. She eventually received a final judgment against him in bankruptcy court in the amount of $125,000.00 which he stipulated was nondischargeable. She did not receive any money from this judgment.

## DISCUSSION.

*(1) Agency Issues.*

Appellant makes a series of arguments attacking Lear's case establishing David's agency and Equitable's liability. First, it argues that Lear did not prove that David was Equitable's agent and more specifically she did not demonstrate its right to control David.[4]

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[4]Equitable also argues that Lear did not plead David's agency in her complaint. The pleadings state that David was an insurance agent employed by Equitable with either actual or apparent authority to transact Equitable's business. This certainly complies with Fed. R. Civ. P. 8(a)(2)'s requirement of a short and plain statement of the claim showing that the plaintiff is entitled to relief.

These arguments are unpersuasive. We may only reverse a jury verdict, as Equitable has requested, when, viewing the evidence in a light most favorable to the verdict and giving the prevailing party the benefit of all reasonable inferences, no evidence of substance supports it. *Smith v. Honeywell, Inc.*, 735 F.2d 1067, 1069 (8th Cir.), *cert. denied*, 105 S.Ct. 576 (1984). We believe the evidence was sufficient to support a finding of an agency relationship.

An agency relationship is created when "one person, the agent, consents with another, the principal, to act on behalf of the principal subject to the control of the principal." *George v. Lemay Bank and Trust Co.*, 618 S.W.2d 671, 674 (Mo. Ct. App. 1980).[5] The contracts between Equitable and David, especially the ones signed February 25, 1974 and October 1, 1966, call him "the agent" (except for one paragraph which states that he is an independent contractor free to make his own decisions), do not allow him to work for another insurance agency, place limits on his authority and state that he is subject to Equitable's rules and regulations. The testimony at trial also revealed that he was supervised by Equitable's officials. This evidence is sufficient to show that David consented to act on Equitable's behalf, subject to its control, and that he was not an independent contractor who worked according to his own methods. *See id.*

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[5]Missouri law controls in this action as a federal court must apply the substantive law of the forum in which it sits when federal jurisdiction is based solely on diversity of citizenship. *See Wolgin v. Simon*, 722 F.2d 389, 391 (8th Cir. 1983).

Equitable also argues that there is insufficient evidence proving David's authority to do his acts.[6]

As to the first premium check given by the Lears we disagree. In this analysis we are mindful that our focus is not whether Equitable authorized the fraud which was perpetrated against Lear, but rather we examine the question whether it authorized the payment of monies to David. *See Globe Indemnity Co. v. First National Bank in St. Louis*, 133 S.W.2d 1066, 1071 (Mo. Ct. App. 1939). In David's employment contracts, the first paragraph specifically lists the collection of first premium checks from annuity holders as one of the acts which the agent is authorized to do. From this we conclude that Equitable had given David express or actual authority, *see Hyken v. Travelers Insurance Co.*, 678 S.W.2d 454, 457 (Mo. Ct. App. 1984), to collect the Lears' first check dated January 10, 1973 for $25,000.00, and is therefore liable to Lear for this first misrepresentation.

As to the other checks written by the Lears, there is no such express authority. Therefore, we must consider whether there was apparent authority for David's acts. Apparent authority is created when a principal places an agent in such a situation or creates such an appearance that a third person reasonably and prudently believes the agent has the authority to act. *Jefferson-Gravois Bank v. Cunningham*, 674 S.W.2d 561, 563 (Mo. Ct. App. 1984); *Houston*

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[6]In order to hold appellant liable for the acts of its agent Lear must establish both "the agency relationship [which we have just found to exist], and the scope of the agent's authority." *Houston v. Groth Enterprises, Inc.*, 670 S.W.2d 178, 180 (Mo. Ct. App. 1984); *see also Hyken v. Travelers Insurance Co.*, 678 S.W.2d 454, 457 (Mo. Ct. App. 1984).

*v. Groth Enterprises, Inc.*, 670 S.W.2d 178, 180 (Mo. Ct. App. 1984).

Prior courses of dealings and similar transactions can create such a situation. *See Jefferson-Gravois Bank*, 674 S.W.2d at 563-64. Allowing David to collect the Lears' first check could be seen as creating apparent authority for the agent to collect all premium checks. However, we must focus not only on the acts of the principal but also on the question whether the Lears were acting reasonably and as persons of ordinary prudence. *See Houston*, 670 S.W.2d at 180.

In exchange for each of their checks the Lears signed with David what can only be described as personal notes[7]. The notes do not state that David agreed to invest the money in Equitable but rather that *he* would pay them a fixed amount every month. The notes never, at any point, mention Equitable. They were not printed but were either typed or handwritten, were never more than one page in length, and could be easily read. As stated, the Lears never received any documents or applications of any sort from Equitable other than David's business card which he gave them.[8] Moreover, the checks they received from David did not appear to be drawn upon a business account, but rather were from his personal account which listed both him and his wife as account holders.

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[7]*See supra* note 3.

[8]It does not help the Lears that David said he would file all applications for them as apparent authority cannot be based on the declarations of an agent. *See Houston*, 670 S.W.2d at 180.

We appreciate the fact that the Lears were elderly and in somewhat poor health at the time of these transactions. However, the totality of the evidence, especially the personal notes, leads us to hold that an ordinarily reasonable and prudent person could not reasonably have believed that David had the apparent authority to collect the later premium checks.

Again, while we are mindful that it is for the jury and not us to evaluate and weigh the evidence, an examination of the record as a whole simply does not disclose the evidence of substance which is needed to support this jury verdict. *See Sanders v. St. Louis County,* 724 F.2d 665, 668 (8th Cir. 1983). Since we have now found that Equitable could not be liable for more than the misrepresentations made in connection with the first check, this case will be remanded for a redetermination as to the amount of actual and punitive damages[9] for which Equitable is or may be liable.[10]

*(2) Statute of Limitations Issues.*

Appellant next raises arguments dealing with the statute of limitations. Equitable contends that as a matter of law we should find that Lear did not prove this action was brought within the applicable statute of limitations period,

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[9]From what has been said, it follows that further discussion of Equitable's claims that the evidence was insufficient to prove damage is unnecessary.

[10]Equitable also argues that David was the agent of both the insured and the insurer. *See Meyers v. State Farm Life Insurance Co.,* 416 S.W.2d 10, 16 (Mo. Ct. App. 1967). While a case can be made that David was the agent of the Lears, this argument was not submitted to the jury, and the evidence is not sufficient to establish it as a mater of law.

and that the district court erred in not instructing the jury on the statute.

At trial Equitable did not request a specific written instruction dealing with the statute of limitations, but prior to the charge to the jury it did object that a statement regarding the statute should be placed in the verdict director instruction. Lear argues that appellant cannot make this argument on appeal because it failed to request such an instruction.

We note that Fed. R. Civ. P. 51 allows a party to file a request that the court instruct the jury on a particular matter and specifically states that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict." From this we read the rule as stating that while a party *may* request an instruction, ordinarily what is necessary in order to preserve the matter for appeal is to object to the instruction or in some way alert the district court to a potential error before submission to the jury. *See Honeywell, Inc.,* 735 F.2d at 1069; *Missouri Pacific Railroad v. Star City Gravel Co.,* 592 F.2d 455, 459 (8th Cir. 1979). Therefore, in present circumstances we believe Equitable's objection was sufficient to preserve the matter on appeal.

Lear also complains that Equitable cannot raise the instruction issue because it was not raised in Equitable's motion for a new trial. However, we have previously held that a motion for a new trial is not a prerequisite to raising an objection to a jury instruction on appeal where, as here, the instruction was objected to at trial. *See Sherrill v. Royal Industries,* 526 F.2d 507, 509 n.2 (8th Cir. 1975).

In order to establish that the trial court erred in not instructing on this issue Equitable must prove that there is

material evidence to support its affirmative defense and that it was prejudiced. *See Hale v. Firestone Tire and Rubber Co.*, 756 F.2d 1322, 1331 (8th Cir. 1985); *Crues v. KFC Corp.*, 729 F.2d 1145, 1152 (8th Cir. 1984).

The applicable statute of limitations is Mo. Rev. Stat. § 516.120(5) which states that an action for fraud must be brought within five years of the date of discovery which must be within ten years of the acts creating the fraud. The cause of action accrues when a person discovered or should have discovered the fraud except when a fiduciary relationship exists and then the period begins on the date of actual discovery. *Burr v. National Life & Accident Insurance Co.*, 667 S.W.2d 5, 7 (Mo. Ct. App. 1984).

Here, the acts constituting the alleged fraud occurred in 1973, and this action was filed on March 15, 1983. The facts are unclear as to when Lear first discovered the fraud. There is evidence it might have been in 1980 when her husband died, in 1978 when she went to the Hannibal police to inquire into where David lived, or in 1974 when she testified she first began having problems with the income checks. Lear contends that the date of discovery should be the actual date of discovery and not when she should have discovered the fraud because there was a fiduciary relationship between the Lears and David.

We find that the district court erred and Equitable was prejudiced in not submitting an instruction on this issue to the jury. There is material evidence supporting appellant's affirmative defense and the facts are controverted. Since there are conflicting facts which are more properly to be evaluated by a jury, we cannot decide this issue as a matter of law. Therefore, we reverse on this issue and direct that on remand of the case for a new trial the question whether

Lear brought her claim within the statute of limitations should be submitted and determined.

*(3) Effect of Judgment Against David.*

Appellant argues that by pursuing David personally in bankruptcy court on the basis of the notes, Lear has elected her remedies and is collaterally estopped from suing Equitable on account of the same acts, contracts and transactions. We are not so persuaded.

First, we are not certain that it is not res judicata, or claim preclusion, rather than collateral estoppel, or issue preclusion, that Equitable is raising since it seems to argue that Lear's claim is barred. *See* 1B J. Moore, *Moore's Federal Practice,* ¶ 0.401 (2d ed. 1984). Regardless, neither doctrine applies here because the same claim or issue is not involved since the prior case was based on David's obligation under the personal notes while this case is based on the misrepresentation.

Res judicata can be applied when a party could have raised an issue in a prior case but did not. *Brown v. Felsen,* 442 U.S. 127, 131 (1979). However, this does not block the present suit, for while David might have been able to raise the res judicata defense if he had been sued again here, Equitable cannot raise it. Moreover, Equitable's claim of collateral estoppel may be somewhat misguided for, if the doctrine applies, it is possible that Lear could raise it and claim Equitable is estopped from denying liability at least for $125,000.00. The bankruptcy judgment of course is not a limit as to the amount of punitive damages since in Missouri a principal may be found liable for exemplary damages regardless of whether the agent is found so liable.

*Tietjens v. General Motors Corp.*, 418 S.W.2d 75, 88 (Mo. 1967).

We are hesitant to apply the doctrine of election of remedies as it is harsh and not favored by the courts. *Quinn v. DiGiulian*, 739 F.2d 637, 644 (D.C. Cir. 1984). It does not apply here because, while Lear could elect her remedies as to David, it has not been demonstrated that there was a real election to be made to Equitable's liability. Finally, we are unwilling to apply election of remedies where, as here, Equitable has not been substantially prejudiced. *See Inland Waterways Corp. v. Doyle*, 204 F.2d 874, 879 (8th Cir. 1953); 1B J. Moore, *Moore's Federal Practice*, ¶0.405[7] (2d ed. 1984). Equitable did not have to defend or be involved in the prior suit, and there was no confusion as to what it had to defend against as only one claim has been and could be raised against it. Moreover, there is little chance of double recovery as there appears to be little hope of recovering from David.

*(4) Agency Instruction Issue.*

Equitable argues that is was error for the trial court to give instruction number six which was Missouri Approved Instruction 13.02 defining actual authority, and instruction number seven, a non-MAI, which defined apparent authority. It contends that only instruction six properly states the applicable substantive law and that it was misleading to give an alternate definition as to scope and course of agency in instruction seven.

Appellant's argument is unpersuasive. We have recognized that because of the trial court's broad discretion in making jury instructions we will not reverse on this

basis "as long as the entire charge fairly and adequately contains the law applicable to the case. . . ." *Board of Water Works Trustees v. Alvord, Burdick & Howson,* 706 F.2d 820, 823 (8th Cir. 1983). Also, parties are entitled to have the jury instructed on their theory of the case so long as it is properly requested, including a party's alternate theory of the case. *Bartak v. Bell-Galyardt & Wells, Inc.,* 629 F.2d 523, 528 (8th Cir. 1980). We further note that the district court is not required to give an instruction out of the MAI. *See Chohlis v. Cessna Aircraft Co.,* 760 F.2d 901, 904 (8th Cir. 1985).

Here, instruction number seven on Lear's alternate theory of apparent authority allowed the jury to find authority based on the acts of Equitable without looking to the acts of the agent. This is an accurate statement of the Missouri definition of apparent authority. *See Hyken,* 678 S.W.2d at 457-58. Therefore, we conclude it was proper to submit both instructions six and seven as they properly stated Lear's alternate theories of relief and were not misleading.

*(5) Verdict Director Issue.*

Equitable next argues that it was error to submit instruction number five, the verdict director, because it did not require the jury to find that there was a contemporaneous intent by the agent not to perform at the time the misrepresentation was made.

This issue has not been properly preserved for appeal because Equitable did not request an instruction on this issue, nor did it timely object to the court's failure to give such an instruction in accordance with Fed. R. Civ. P. 51. *See Honeywell, Inc.,* 735 F.2d at 1069. Nor has plain er-

ror been shown, *see id.*, since there is evidence which would point to David's contemporaneous intent to defraud such as the personal notes which were signed by the Lears and David when the couple gave him the checks. This could fairly be said to evince an intention on his part to not give the money to Equitable.

*(6) Deposition Issue.*

Equitable argues that the trial court erred in allowing Lear to offer into evidence portions of a deposition of C. B. Peterson, an Equitable employee. It contends that she had violated the pretrial discovery orders and had not provided appellant's attorney with notice prior to trial that she would use this evidence.

As a district court has broad discretion in handling these matters, we are hesitant to reverse "unless, in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness. . . ." *Voegeli v. Lewis,* 568 F.2d 89, 96 (8th Cir. 1977); *see also Phil Crowley Steel Corp. v. Macomber, Inc.,* 601 F.2d 342, 344 (8th Cir. 1979).

Here the record revealed that Peterson lived in Cook County, Illinois (the trial took place in Hannibal, Missouri), and that Lear did attempt to subpoena him but was unable to do so. We are not told whether if Equitable had wanted its employee present to testify it could have procured his attendance. But in any event, we do not find that the district court abused its discretion. This deposi-

tion evidence could have been admitted under Fed. R. Civ. P. 32(a) (3) (B) and (D).[11]

*(7) Parol Evidence Issue.*

Last, Equitable argues that it was a violation of the parol evidence rule to allow Lear to testify as to what she believed David would do with the monies and thereby vary the terms of the notes signed by the Lears and David.

This argument is meritless. Lear was attempting to prove the misrepresentation and not who was the obligor under the notes through this testimony. Therefore, the parol evidence rule does not exclude this testimony. *See Crawford v. Smith,* 470 S.W.2d 529, 532 (Mo. 1971) (en banc.)

CONCLUSION.

To summarize, we have just held that David was neither actually nor apparently authorized to collect more than the first check from the Lears, and as a result Equitable is not liable for more than damages flowing from the first misrepresentation. Therefore, we remand the case so that the amount of damages, both actual and punitive, if

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[11]Equitable also argues that the trial court erred in admitting "certain exhibits" which violated the pretrial order due to Lear's failure to provide them to defense counsel prior to trial. As appellant's brief does not identify which exhibits these are, we are unable to determine whether the district court abused its broad discretion in admitting them. *See McDowell v. Safeway Stores, Inc.,* 753 F.2d 716, 717 (8th Cir. 1985). Appellee seems to believe that they are checks written on David's personal account to Equitable, and which appellant had in it's possession prior to trial. From this limited record we cannot find any abuse of discretion.

any, can be calculated. On remand the trier of fact may determine as well whether the statute of limitations was satisfied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1453-EM

Elsie M. Lear,

Appellee,

vs.

The Equitable Life Assurance Society of the United States,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

Appellee's petition for rehearing has been considered by the Court and is denied.

September 4, 1986

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

ELSIE M. LEAR

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant.

No. N83-39 C

JUDGMENT

This action came for trial before the Court and a jury, Honorable Stephen N. Limbaugh, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict;

IT IS ORDERED AND ADJUDGED that the plaintiff, Elsie M. Lear, recover of the defendant, The Equitable Life Assurance Society of the United States, the sum of Two Hundred Fourteen Thousand and no/100 Dollars ($214,000.00) actual damages and the sum of Two Hundred Thousand and no/100 Dollars ($200,000.00) punitive damages, with interest at the rate of 11.36% per annum and costs.

Dated at Hannibal, Missouri,
This 17th of October, 1984.

/s/ Stephen N. Limbaugh
United States District Judge

**APPENDIX D**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

ELSIE M. LEAR

Plaintiff,

vs.

No. N83-39 C

THE EQUITABLE LIFE
ASSURANCE SOCIETY
OF THE
UNITED STATES,

Defendant.

IT IS HEREBY ORDERED that defendant' motion to strike plaintiff's brief in opposition to defendant's motion for judgment notwithstanding the verdict or for new trial be and is DENIED.

IT IS HEREBY ORDERED that defendant's motion for judgment notwithstanding the verdict or for new trial be and is DENIED.

Dated this 18th day of March, 1985.

/s/ Stephen N. Limbaugh
UNITED STATES DISTRICT
JUDGE

## APPENDIX E

Acts are within the scope and course of agency, as that phrase is used in these instructions even though not specifically authorized by the Defendant Equitable Life Assurance Society of the United States if

FIRST, they were done by Denzil Daniel David to further the business of Defendant Equitable Life Assurance Society of the United States under the general authority and direction of the Defendant Equitable Life Assurance Society of the United States, and

SECOND, they naturally arose from the performance of Denzil Daniel David's work.